83-1794

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD J. REGAN,

Petitioner,

vs.

THE TOWN OF BROOKHAVEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(516) 732-6614

QUESTIONS PRESENTED

1. The decision below affirms a determination that petitioner was not deprived of his right of due process and therefore conflicts with this Court's Decisions in *Wisconsin v. Constantineau* 400 U.S. 433 and *Board of Regents v. Roth* 408 U.S. 564

2. The decision below affirms a determination that petitioner did not establish a claim under 42 U.S.C. Sec. 1983 and therefore conflicts with this Court's Decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658

3. Petitioner's case was dismissed before discovery was completed and he was therefore unable to state all the facts in support of his assertion that his Constitutional rights were impaired.

4. The Lower Court determined that the harms resulting from the complaint against the petitioner are indirect impairments and such alleged deprivations are not sufficient to invoke the procedural protection of the due process claus, and therefore conflicts with this Court's decision in *Hannegan v. Esquire, Inc.* 327 U.S. 146, 156.

5. The issues presented are of public importance.

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THE TOWN OF BROOKHAVEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Edward J. Regan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, A-1) is not reported. The opinion of the District Court (App. C, infra, C-1) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, infra B-1) was entered on March 29, 1984. The jurisdiction of this Court is invoked under Title 42 of the United States Code, Sections 1983 and 1985, and Title 28 of the United States Code, Section 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that freedom of speech and the right to petition the Government for a redress of grievances shall not be abridged.

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment provides in relevant part:

> No State . . . shall abridge the privleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The Town of Brookhaven applied for and obtained a federal matching funds grant on behalf of a special district in which the petitioner resides, for the purpose of building a playground on district policy. Fraudulent statements were made on the grant application to induce the Department of the Interior's Bureau of Outdoor Recreation to approve the grant.

The majority of the residents of the special district opposed the Town's plan and took action to prevent the building of the playground, have the Federal grant cancelled and prevent the waste of their tax money.

Petitioner spoke at public meetings against the project, engaged in public activities and petitioned with other residents of the district and conducted litigation against the Town. Petitioner also brought the fraudulent statements contained in the grant application to the attention of the public and to government officials.

The Town then held a referendum on the question. Three hundred seventy-five people voted against and nineteen people voted for the proposed playground. The plan for the proposed playground had been submitted as part of the grant application and the Town represented to a Federal agency that this plan had been approved by a majority of the district residents.

As a result of petitioner's and other residents' activites, the playground was not built and the Town lost a Federal matching funds grant.

The Town then sought to punish the petitioner for exercising his constitutionally protected rights of free speech, petition, etc. to oppose the playground. In retaliation for petitioner's activities, the Town of Brookhaven, through an Assistant Town Attorney, acting with the approval and sanction of her superior, the Town Attorney, who is the highest paid and one of the highest officials of the Town, filed a complaint against the petitioner with the Suffolk County Bar Association and the Grievance Committee of the Tenth Judicial District, which attempted to deprive him of his license to practice law, his good reputation and constitutionally protected rights, and to silence him, as is the Town's custom.

The complaint was typed on the seal-bearing official stationery of the Town of Brookhaven thereby indicating a cloak of authority and the approval of the Town of Brookhaven and its elected officials.

The Assistant Town Attorney sought and obtained the approval of the Town Attorney before making the complaint. The Town Attorney is one of the highest officials of the Town and his actions can be said to be those of the Town. When an Assistant Town Attorney acts with the approval of the Town Attorney, the actions are those of the Town.

The Town Attorney testified that when he used Town stationery for matters that were not Town business, he had the word "unofficial" typed beneath the letterhead. In subsequent letters explaining her use of her title and Town stationery for the complaint, the Assistant Town Attorney had "unofficial" typed beneath the Town's letterhead. The original complaint, however, did not have "unofficial" typed beneath the letterhead, thereby indicating that the Assistant Town Attorney and the Town Attorney intended the complaint to be regarded by the Grievance Committee as the Town's complaint, and it was.

The matter complained of by the Town were statements made in an affidavit made in connection with litigation against the Town. The complaint states that in the affidavit, "in addition to personal attack with a distinct sexist bias, are thinly veiled accussations of perjury." The complaint then assures the statements made in the affidavit for the Town were true.

The statement made in the affidavit which the Town claimed was sexually biased was: "Convince a woman against her will and she'll have the same opinion still." It was an ad hoc rendering of part of the poem "Hudibras" by Samuel Butler. The original version is: "He who complies against his will, is of the same opinion still." In effect, the petitioner called the Assistant Town Attorney a woman, which she is.

The statement was made as part of an argument in which the petitioner was demonstrating that a sworn statement in an affirmation made by the Assistant Town Attorney was contradictory to statements she had made in the press and also contradictory to a sworn statement made in the Town Supervisor's affidavit.

A question of title to the greenbelt on which the playground was to be built was part of the litigation. The Assistant Town Attorney had told the New York Times that the Town held the land in trust for the District. At a public hearing at which the Assistant Town Attorney and the Town Supervisor were present, the residents of the community were told that the land

belonged to them and the Town held it in trust. In her affirmation, the Assistant Town Attorney said the Town owns the land. In his affidavit, the Supervisor said "the property is district property." Petitioner built his argument around these conflicting statements.

The main thrust of the complaint was that the petitioner pointed out the conflicting sworn statements that were part of litigation. Her defense of the truth of her statements and her accusation that the petitioner had made "thinly veiled accusations of perjury" indicate that her main grievance was that petitioner charged that contradictory statements had been made on behalf of the Town.

The statements were made by the petitioner in an effort to do his professional duty. The statements were made in an affidavit which was part of litigation, in which petitioner's right and duty to point out contradictions in his opponent's position are absolutely privileged by the right of free speech.

Petitioner believes that because the statements he made were absolutely privileged by free speech, the Bar Association would have dismissed the complaint out of hand if it had not been the Town's complaint.

The Bar Association considered the complaint and the petitioner believes that it intended initially to at least censure him. After he filed a notice of claim and intent to sue the Town, the Town Attorney was directed to write to the Bar Association informing it that the complaint was not to be regarded as the Town's complaint. The Bar Association then deliberated again and recommended dismissal of the complaint. Petitioner, however, received a letter of admonition telling him to be more courteous.

The petitioner brought this civil rights action against the Town of Brookhaven, seeking to recover damages from the abuse of Town power and position and malicious and intentional denial of his rights under the United States Constitution without due process in retaliation for the exercise of his rights of free

speech and petition to prevent the building of a playground, waste of Federal and local tax money and fraud against the Federal Government.

The civil rights action was brought in the United States District Court for the Eastern District of New York. A subpoena was served in the normal course of discovery upon the Assistant Town Attorney who had made the complaint. Several days after the subpoena had been served, the Hon. Jacob Mishler dismissed the case sua sponte, overruling the order of Hon. David Jordan, Magistrate, which had allowed discovery and placed the case on the trial calendar.

The petitioner was given no notice that dismissal of his case was being comtemplated. No motion to dismiss and no motion for summary judgment had been made. Petitioner was given no opportunity to defend against the dismissal of his case. He was not even given leave to replead. Petitioner was prevented from examining the Assistant Town Attorney to determine her state of mind and motivations for making the complaint. Petitioner was prevented from completing discovery which would have proved his allegation that the Town's action was in retaliation for his exercise of free speech, petition, etc. The lower court, in effect ruled that the Town's actions were not in retaliation for the exercise of constitutional rights, thereby determining fact.

Petitioner sought discovery of Grievance Committee files to obtain evidence that would support his allegations that the complaint was given undue weight because it was the Town's complaint. The lower court quashed the subpoenas served for that purpose, thereby denying disclosure.

Petitioner was not given an opportunity to attend the deliberative sessions of either the Suffolk County Bar Association Grievance Committee or the Grievance Committee for the Tenth Judicial District. His fate was decided in secret. He was not given a copy of the files regarding this matter and has not been allowed to examine it because it is sealed.

The case was appealed to the U.S. Court of Appeals for the Second Circuit which considered and denied petitioner's due process claim and affirmed the lower court decision which determined fact.

In recognition of his civic responsibilities and professional obligation for service to the public, the petitioner engaged in independent advocacy in an effort to prevent the Town from building a playground that the majority of the people of the community did not want. He exercised his rights of free speech and petition to oppose the Town's project, to prevent the waste of tax money and to speak out against the perpetration of fraud against the Federal government. The Town punished him by making charges against him that have seriously damaged him personally and professionally. He was charged with unprofessional conduct and sexist bias. He was stigmatized because he spoke out against the Town.

The Town has not only punished the petitioner for exercising his constitutional rights, it has restrained him from speaking out against Town policies and actions. The Town has quelled petitioner's professional independence and placed him under governmental domination. The Town's actions have had a chilling effect upon the petitioner and have, in fact, silenced him and prevent him from speaking out against Town policies and exposing fraud. The Town has crushed petitioner's independence.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS

The Decision Below Affirms a Determination that Petitioner was not Deprived of His Right of Due Process and Therefore Conflicts with This Court's Decisions in *Wisconsin v. Constantineau* 400 U.S. 433 and *Board of Regents v. Roth* 408 U.S. 564.

In *Board of Regents v. Roth*, supra., this Court ruled that the nonretention of Roth absent any charges against him or stigma or disability foreclosing other employment is not tantamount to a deprivation of liberty and the terms of Roth's employment accorded him no property interest protected by procedural due process. The Court reasoned as follows: "The state, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. . . Had it done so, this would be a different case. For where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. In such a case, due process would accord an opportunity to refute the charge before University officials."

In *Wisconsin v. Constantineau*, supra., this Court ruled: "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

The Town charged the petitioner with unethical conduct and sexist bias. That charge was a charge that might and did seriously damage his standing and associations in his community, that is, the legal community. He was stigmatized. Therefore, his constitutional right of due process entitled him to a hearing before Town officials. Notice and an opportunity to be heard would have given the appellant a chance to refute the charge before Town officials. No notice and no opportunity to refute the charge was given to him before the Town made its charge.

The Decision Below Affirms a Determination that Petitioner did not Establish a Claim under 42 U.S.C. Sec. 1983 and Therefore, Conflicts with this Court's Decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658.

The Assistant Town Attorney obtained the permission and approval of the Town Attorney before filing her complaint against the petitioner. The Town Attorney is a high ranking official who can bind the Town. He speaks and acts for the Town. An Assistant Town Attorney speaking and acting with the Town Attorney's permission and approval, speaks and acts for the Town. The complaint, therefore was not an individual's personal complaint but the Town's complaint.

The Town Attorney and the Assistant Town Attorney both defended the use of Town stationery and title on the grounds that contact with the appellant had been in the course of litigation in which the Assistant Town attorney had represented the Town, an argument that making the complaint was in the scope of employment.

The use of Town stationery, title and position by the Assistant Town Attorney was made possible only because she was clothed with the authority of municipal law. She exercised power possessed by virtue of law. Her title, position, and power were given to her by the Town. The access to and right to use Town stationery was given to her by the Town. The Assistant Town Attorney stated that her actions were taken in the course of the performance of her duties. In the course of that performance, she misused her power which was possessed by virtue of law and made possible only because she was clothed with the authority of law. Her actions therefore constituted Town action.

U.S. V. Classic, 313 U.S. 299
Polk County v. Dodson, 454 U.S. 312, 70 L.Ed. 2d 504, 102 S. Ct. 445.
Scheuer v. Rhodes, 416 U.S. 232, 243.

The Assistant Town Attorney's actions were under color of law and constituted Town action. The case is not respondeat superior.

The actions taken by the Town against the petitioner are part of a continuing pattern of behavior to silence, oppress and deny constitutional rights to those who oppose its actions and/or attempt to expose fraud and corruption. These actions constitute policy or custom of the Town.

The policy and/or custom was articulated at a Town Council meeting by a Councilman who stated that action must be taken against people who cast aspersions against the Town. The Town has taken such action.

Mrs. Maria Van Houten, a married woman with children, a concerned citizen active in civic affairs, urged the Town to take action against an oil company that was polluting the ground water. She was slandered by the Town Attorney, who accused her of adultery. As a result, she lost stature in the community and among civic leaders. She was, in effect, silenced. Mrs. Van Houten sued the Town Attorney and the Town. The Town paid $25,000.00 in settlement of the case and bore full responsibility for the Town Attorney's unwarranted accusation of adultery on the ground that he was acting in his official capacity, thereby admitting that the actions of the Town Attorney are the actions of the Town.

Former Deputy Town Attorney Gloria Rosenblum spoke out against corruption in the liquid asphalt bidding, gave information to the District Attorney and testified in Court during a case involving the bidding. She was fired, publically defamed in newspaper articles, and a complaint was made against her to the Ethics Committee of the Suffolk County Bar Association. The Town considered making the complaint to the Grievance Committee, but ultimately made the complaint to the Ethics Committee on the advice of a Councilman who had been Chairman of the Ethics Committee.

In her Section 1983 suit against the Town, the Town Attorney and the councilmen who voted to fire her, it was ruled that the Town Attorney, the Supervisor and persons speaking with the approval of the Supervisor were acting and speaking for the Town. The case was dismissed against the individual defendants and allowed to proceed only against the Town. The Town paid

damages to Mrs. Rosenblum. The case determined that the Supervisor and the Town Attorney were high officials whose actions constitute Town action. It also determined that the actions of lower ranking officials that were approved by high officials also constitute Town action.

George Proios, former director of environmental protection in the Town of Brookhaven, opposed what he felt was the lack of adequate environmental regulations and enforcement in the Town of Brookhaven. He opposed what he felt was exploitive, improper development within the Town. He objected to the construction of the Natcon Chemical Company, Inc., plant which was financed with a $1 million Industrial Revenue Bond through the Town's Industrial Development Agency.

Proios also provided information which he believed evidenced fraud on the Town's application for Federal Community Block Development grant funds, in connection with a water project to Assemblyman I. William Bianchi. He was fired and defamed in newspaper articles by statements made by the Town through high officials.

Assemblyman I. William Bianchi, Jr., made charges that the Town's application for $2.8 million in federal funds included false and misleading statements, questionable projects and abuse of funds to finance political jobs. A complaint was made against him to the New York State Assembly Committee on Ethics.

The individuals mentioned above, like the petitioner, spoke out against policies and/or fraud on the part of the Town and were punished for the exercise of their constitutional rights of free speech.

The actions taken by the Town against the petitioner and the above mentioned individuals indicate a continuing pattern of behavior designed to oppress, punish and deny constitutional rights to those who oppose its actions and/or attempt to expose fraud and corruption. The behavior is tailored to fit the station, occupation, etc. of the individual to be punished. A private citizen is slandered. Town employees are fired and defamed.

If the individual is an attorney, a complaint is made to the Grievance Committee or Ethics Committee of the Bar Association and defamed. If the person is a public official a complaint is made to the appropriate ethics committee.

In *Monell v. Department of Social Services*, supra. this Court held that a local government can be sued for monetary, declaratory or injunctive relief, but only if the action that is alleged to be unconstitutional implements or executes "A policy, statement, ordinance, regulation or decision officially adopted and promulgated" by the officers of the corporation or has been taken "pursuant to governmental custom" even though such a custom has not received formal approval through the body's official decision making channels." 436 U.S. at 690-91, 98 S. Ct. at 2036.

The statement of the Town Councilman that action should be taken against people who cast aspersions on the Town and the fact that the Town has made complaints against people who have opposed Town policies and/or corruption through their right of free speech, imply a Town policy or custom of punishing people who exercise their free speech against the Town.

Petitioner's Case Was Dismissed Before Discovery Was Completed and He was Therefore Unable to State All the Facts in Support of His Assertion that His Constitutional Rights Were Impaired.

Petitioner was denied disclosure of Grievance Committee files. The case was dismissed several days after a subpoena was served upon the Assistant Town Attorney and a few days before the deposition was scheduled. Proof supporting petitioner's assertion that his constitutional rights were impaired calls the Assistant Town Attorney's state of mind and motivation into question. Since petitioner was prevented from examining the Assistant Town Attorney, he could not obtain necessary evidence.

In *Hutchinson v. Proxmire*, 443 U.S. 111, in Footnote 9 at p. 120, Chief Justice Burger stated: "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." (i.e. in determining whether a plaintiff had made an adequate showing of "actual malice,"

summary judgment might well be the rule rather than the exception). The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254, and does not readily lend itself to summary disposition. See 10C. Wright & A. Miller, Federal Practice and Procedure Sec. 2730, pp. 590-594. Cf. *Herbert v. Lando*, 441 U.S. 153.

The dismissal of petitioner's action was in effect a summary disposition made before he could acquire all the proof necessary to sustain his allegations that his constitutional rights had been violated.

The Lower Court Determined that the Harms Resulting from the Complaint against the Petitioner are Indirect Impairments and such Alleged Deprivations are not Sufficient to Invoke the Procedural Protection of the Due Process Clause, and Therefore Conflict with This Court's Decision in *Hannegan v. Esquire, Inc.* 327 U.S. 146, 156.

The petitioner was not employed by the Town. He was not in a position where the Town could take direct action against him for the exercise of his constitutional rights, for example, firing him. The Town could, therefore only take indirect action against him. The indirect action was making a complaint to the Grievance Committee, a state agency, and seeking to have that state agency punish him.

As a result of this complaint, petitioner can no longer speak out against the Town and oppose corruption and fraud. He cannot demonstrate that the Town has made contradictory sworn statements. If he does, another complaint will probably be made, and since petitioner has already been warned, the penalty will be greater.

In *Hannegan v. Esquire, Inc.*, supra., this Court held that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly.

By making the complaint against the petitioner, the Town has placed limitations on petitioner's freedom of speech, which it could not do constitutionally if done directly. These indirect deprivations are therefore sufficient to invoke the protection of due process.

THE PUBLIC IMPORTANCE OF ISSUES PRESENTED

Local governmental corruption and fraud is rampant throughout the nation. The President of the United States has spoken against fraud perpetrated against the Federal Government in the attempt to obtain Federal grants.

In the Town of Brookhaven, the petitioner and other individuals have spoken out against and attempted to prevent fraud being perpetrated against the Federal Government, waste of taxes and other corruption. These individuals have been punished for doing so and the punishment is a restraint against their continuing to do so.

If the Town of Brookhaven is allowed to continue its course of conduct of punishing people who speak out aginst waste, corruption and fraud, the people of the Town, the nation, and the Federal Government itself, will suffer. The Town will be able to continue applying for and receiving Federal grants even though they perpetrate fraud against the Federal Government to obtain the grants, because those who would speak out and attempt to prevent the fraud will be afraid to do so because of retaliation. The tax money of the people of this nation will be wasted on unworthy projects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWARD JOSEPH REGAN,
Pro Se
300 Timbercrest Lane
South Setauket, New York 11720
(516) 732-6614

April 27, 1984.

APPENDICES

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of March, one thousand nine hundred and eighty-four.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE AMALYA L. KEARSE,

HONORABLE LAWRENCE W. PIERCE,

Circuit Judges.

EDWARD J. REGAN,

Plaintiff-Appellant,

– against –

THE TOWN OF BROOKHAVEN,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

1. Appellant urges his complaint should not have been dismissed by the trial court. This argument is without merit. To establish a claim cognizable under 42 U.S.C. § 1983, it is necessary to allege facts demonstrating deprivation of a constitutional right. *Paul v. Davis*, 424 U.S. 693 (1975). Regan stated no facts in support of his assertion that his rights of speech or of counsel were impaired. Similarly, the harms which he ascribes to Levy's complaint to the Bar Association Grievance Commmittee are, at worst, indirect impairments stemming from an alleged damage to reputation. Such alleged deprivations are not "sufficient to invoke the procedural protection of the due process clause." *Id.* at 701.

2. Appellant's assertion that the trial court improperly granted the motion to quash subpoenas to the Grievance Committee is also without merit. Where charges against an attorney are dismissed the records are sealed, and disclosure requires an application to a Justice of the Appellate Division, New York Supreme Court, N.Y. Judiciary Law § 90(10)(Mckinney 1983). Regan failed to exhaust this state remedy.

3. Appellant's other claims are similarly meritless.

4. Accordingly, the judgment dismissing the complaint and the order granting the motion to quash are affirmed.

/s/ _____
IRVING R. KAUFMAN,

/s/ _____
AMALYA L. KEARSE,

/s/ _____
LAWRENCE W. PIERCE,
Circuit Judges.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

EDWARD J. REGAN,

Plaintiff,

– against –

THE TOWN OF BROOKHAVEN,

Defendant.

----------X

A memorandum and order of Honorable JACOB MISHLER, United States District Judge, having been filed on December 12, 1983, finding the complaint frivolous and wholly without merit; and dismissing the complaint with prejudice, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant; and that the complaint is dismissed with prejudice.

Robert C. Heinemann
Clerk of Court

By: /s/_____
Joseph DiTalia
Deputy-In-Charge

Dated: Uniondale, New York
December 12, 1983

Judgment
CV-82-2719 (J.M.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

EDWARD J. REGAN,

Plaintiff,

– against –

THE TOWN OF BROOKHAVEN,

Defendant.

----------X

APPEARANCES:

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MISHLER, District Judge

Edward J. Regan, plaintiff, filed an action in New York State Supreme Court to enjoin the Town of Brookhaven from conducting a referendum to construct a playground. During the course of that litigation, Mr. Regan allegedly made a sexually biased comment in legal papers about the attorney for the Town of Brookhaven (the "Town"), Sherri Ann Levy. Ms. Levy filed a complaint with the Suffolk County Bar Association (the "Association"). Ms. Levy's complaint was written on stationery bearing the seal of the Town. Mr. Regan also filed a complaint

Memorandum
of Decision
and Order

December 8, 1982

with the Association. On October 6, 1982, the State of New York Grievance Committee for the Tenth Judicial District dismissed both complaints. The Grievance Committee stated in a letter to Mr. Regan which he has made part of the record in this action:

> On October 6, 1982, the Grievance Committee for the Tenth Judicial District met to determine the complaint lodged against you with the Suffolk County Bar Association by Sherri Ann Levy, Esq.
>
> After deliberation, the Committee determined that there was no breach of the Code of Professional Responsibility on your part, and the complaint was dismissed. However, the committee wishes to advise you to conduct yourself in a more courteous and professional manner when dealing with other attorneys.

Mr. Regan attempted to appeal the Committee's dismissal of Ms. Levy's complaint as well as the dismissal of his complaint against Ms. Levy. The committee rejected both contentions.

Mr. Regan filed this action and he alleges that Ms. Levy's action violated his constitutional rights under the first, fourth, fifth , sixth, ninth and fourteenth amendments to the constitution. He also claims a violation of his rights under 42 U.S.C. §§ 1983 and 1985. He alleges that Ms. Levy's action was undertaken because of his attempts to expose fraud committed by officials of the Town of Brookhaven. Mr. Regan states that as a consequence of the filing of Ms. Levy's complaint he has suffered personal, professional, and monetary damage. He seeks $10,000,000 in compensatory damages, $50,000,000 in punitive damages, attorney's fees and costs, and other relief the court finds is needed.

On November 1, 1983 this court granted defendant's motion to quash Mr. Regan's subpoenas which he had served on the State of New York Grievance Committee for the Tenth Judicial Circuit. The motion was granted because Mr. Regan had not exhausted his state judicial remedies. Defendant now moves purusant to Rule 15, Fed.R.Civ.P., to amend its answer and

add a fifth and a sixth defense. The fifth affirmative defense pleads that the acts complained of pertaining to Sherri Ann Levy do not implement or execute any policy, ordinance, regulation or custom of the Town of Brookhaven. The sixth affirmative defense pleads that the Town of Brookhaven, through its agents and employees, was acting in "good faith" at all times mentioned in plaintiff's complaint. This court, in oral argument on November 22, 1983, granted defendant's motion regarding the fifth affirmative defense but reserved decision regarding the sixth affirmative defense. Plaintiff opposes defendant's motion on the grounds that (1) it is untimely, and (2) insufficient as a matter of law. Plaintiff also cross-moves to strike defendant's second and fourth affirmative defenses. The second affirmative defense is that this court does not have subject matter jurisdiction. The fourth affirmative defense is that Ms. Levy's complaint was privileged and justified. Defendant responds by asserting that adding additional defenses at this stage of the proceeding is not untimely and does not cause plaintiff hardship. Defendant also states that its second affirmative defense was intended to allege that plaintiff has not stated a cause of action.

DISCUSSION

In *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978) the Supreme Court held that a local government can be sued for monetary, declaratory, or injunctive relief, but only if the action that is alleged to be unconstitutional implements or executes "a policy, statement, ordinance, regulation or decision officially adopted and promulgated" by the officers of the corporation or has been taken "pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U.S. at 690-91, 98 S. Ct. at 2036. *See* Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom"*, 79 Col.L.Rev. 304 (1979). A municipality "cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." 98 S. Ct. at 2036, 436 U.S. at 691 (emphasis in original); *see* Comment, *Section 1983*

Municipal Liability and the Doctrine of Respondeat Superior, 46 U.Chi.L.Rev. 935 (1979).

In *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976) the Supreme Court examined a situation where respondent's name and photograph had been publicized as a shoplifter by the Chief of Police. Respondent had been arrested, but not convicted, for shoplifting. Respondent alleged violations of rights guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments and 42 U.S.C. § 1983. The Court held that the "interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." 424 U.S. at 712, 96 S. Ct. at 1166. The Court added that "petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any "liberty" or "property" interests protected by the Due Process Clause." *Id.* The Court also denied respondent's assertion that his constitutional rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments were violated. 424 U.S. at 713, 96 S. Ct. at 1166. The Court found that respondent did not have a right of privacy under those amendments. *Id.*

Similarly, we find that even if Ms. Levy's complaint somehow damaged Mr. Regan, Mr. Regan does not have a cause of action as established in *Paul v. Davis*, *supra*. The actions Mr. Regan complains of were much less egregious than those discussed in *Paul v. Davis* and cases cited therein. Although the Grievance Committee dismissed Ms. Levy's complaint, she appears to have had valid grounds to file one. The Committee's dismissal of her complaint should have ended the matter. Instead, Mr. Regan filed a complaint in federal court seeking astronomical damages. We find that the complaint is frivolous and wholly without merit. The complaint is dismissed with prejudice, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of defendant and against plaintiff.

/s/ _____

U.S.D.J.

No. 83/1794

IN THE

Supreme Court of the United States

October Term, 1983

EDWARD J. REGAN,

Petitioner,

vs.

THE TOWN OF BROOKHAVEN,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari

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Questions Presented.

1. Is petitioner's complaint frivolous and without merit?

Answer—The Court below answered yes and dismissed petitioner's complaint with prejudice.

2. Do the acts complained of constitute a violation of Regan's constitutional rights, privileges or immunities so as to enable him to establish an action under §1983?

Answer—No.

3. Should petitioner's request for a writ of certiorari be granted?

Answer—No.

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No. 83/1794

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

EDWARD J. REGAN,

Petitioner,

vs.

THE TOWN OF BROOKHAVEN,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari.

Statement of the Case.

Edward Regan commenced this action in September of 1982 alleging that the Town of Brookhaven had violated §§1983 and 1985 of Title 42 by forwarding a letter to the Suffolk County Bar Association, signed by an Assistant Town Attorney, Sherri Ann Levy, and typed on Town stationery on June 17, 1981.

Depositions and discovery were held in the following year. Edward Regan testified and the Town Attorney and

the Town Supervisor were deposed. Interrogatories were served and answered.

The defendant moved to amend its answer and add the Fifth and Sixth affirmative defenses alleging that the letter from Sherri Ann Levy was not an execution of an official act, regulation, custom, statute, ordinance or policy of the defendant Town, and the sixth defense, that the acts of the Town's agents were performed in good faith.

Plaintiff opposed the amendments and moved to dismiss defendant's second and fourth affirmative defenses based upon subject matter jurisdiction and privilege.

The Court searched the record and dismissed plaintiff's complaint with prejudice after finding it frivolous and without merit on December 8, 1983 (C1-4).

Plaintiff then filed an appeal.

The Court of Appeals for the Second Circuit unanimously affirmed Judge Jacob Mishler's *sua sponte* dismissal of plaintiff's complaint one day after oral argument on March 29, 1984 (A-1, 2).

Petitioner then filed this request for a writ of certiorari.

Statement of Facts.

Edward Regan commenced litigation against the Town of Brookhaven pertaining to the Town's use of Federal Funds to develop property into a playground within the Town of Brookhaven.

Assistant Town Attorney, Sherri Ann Levy, was assigned to handle the defense of that proceeding. During motion

practice, Mr. Edward Regan, an attorney, executed an affidavit stating that Ms. Levy objected to and thought represented objectionable actions and questionable ethics.

She wrote to the Suffolk County Bar Association on June 17, 1981 and expressed her complaint about Mr. Regan, six days after Regan's affidavit was executed. Levy's letter specifically objected to Regan's allegations and "poetry" on page 8 of his affidavit.

Levy thought Regan's affidavit contained a personal attack with a district sexist bias and thinly veiled accusations of perjury. She referred to Regan's affidavit which in part accuses the Town Attorney of bad faith, conflict of interest, misstatements, and stating contradictory things to different Judges. Regan's affidavit states:

> "Perhaps, though there is another reason for her reversal, there is an old adage which proclaims, 'convince a woman against her will and she'll have the same opinion still.' "

Levy objected to this material being included in litigation papers and requested an *investigation* of the matter.

Mr. Regan filed his answer and own complaint with the Bar Association dated September 28, 1981.

Ms. Levy filed her answer to Regan's complaint on March 30, 1982. She specifically states that she did not intend to infringe on Regan's rights of free speech and in fact wanted the committee to investigate and advise Regan that inclusion of certain remarks in legal papers was improper.

Town Attorney, Martin Kerins, wrote to the Bar Association on December 4, 1981 advising them that Levy's letter was filed by her without the specific approval or disapproval of the Town.

Kerin's correspondence with Town Supervisor Lefkowitz and Councilman Dooley, shows that the grievance was filed by Levy without any formal position by the Town officials either for or against it. In fact, Kerins testified at his deposition that he knew she was filing the grievance but he did not discuss the exact wording with her or whether she was using Town stationery.

On October 13, 1982, the Grievance Committee of the Tenth Judicial District wrote to Mr. Regan, advising him that Levy's complaint had been dismissed, but advising him to be more courteous and professional in dealing with other attorneys.

On November 4, 1982, the Grievance Committee advised Regan there was no provision for the appeal of a Grievance Committee determination to dismiss a complaint, unlike the provision in §691.6 of the Rules of the Second Department which provide for an appeal by an attorney if a letter of caution or admonition has been issued. Clearly, the Committee did not deem its October 13 letter one of "caution or admonition," merely advice.

Regan had already commenced this lawsuit against the Town alleging violations of §§1983 and 1985, one month prior to the decision of the Grievance Committee.

The Town of Brookhaven fails to see how plaintiff's rights have been infringed or how he has been deprived of a constitutional right, privilege or immunity due to this one letter from Levy.

Regan constantly alleges that he has lost his freedom of speech and various other protections. Clearly, the grievance procedure did not inhibit him from commencing a Federal lawsuit seeking $60,000,000.

His license to practice law was never acted against, questioned or threatened. Levy asked for an investigation, she did not request that they disbar him.

Mr. Regan has not seen a physician as a result of the incident, and his law practice was losing money from 1979-1981 prior to this incident.

The complaint by Levy was sent only to the Bar Association and Grievance Committee and not to the general public.

ARGUMENT.

POINT I.

Plaintiff's complaint is frivolous and without merit and should have been dismissed.

Plaintiff pleaded that the Town of Brookhaven violated §1983 by infringing upon his right of free speech and counsel of his choice. The action of the Town was alleged to be under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of New York, Town of Brookhaven and County of Suffolk.

Plaintiff further complained that use of Town stationery in the complaint made by Levy involved a cloak of authority and was part of a scheme to deny Regan his constitutional rights and further that he was denied a hearing.

Plaintiff has not lost any rights due to the complaint filed by Ms. Levy. No action was taken by the Grievance Committee and the complaint was not forwarded to the Appellate Division, Second Department which has jurisdiction to discipline attorneys within its jurisdiction pursuant to Part 691 of the Rules of the Second Department and §90(2) of the Judiciary Law of New York. The Appellate Division Rules, §691.4 provide for the investigation of complaints by Grievance Committees for the Second and Eleventh, Ninth and Tenth Judicial Districts.

Section 691.6 of the Rules of the Second Department provide that the chairman of the Committee can privately admonish or issue a letter of caution to an attorney subject to the attorney's right to a hearing.

The grievance or complaint letter filed by Levy was dismissed. The Committee merely requested Regan to be more courteous with other attorneys. There was no appeal from a dismissal of the complaint.

Regan's lawsuit in the Federal Court is a classic example of wasting Court time and expense with a frivolous complaint. He alleges the following rights or privileges were denied by defendant:

> free speech, counsel of his choice, right of petition, good reputation, right to practice law, right to a hearing, due process, equal protection, right against unreasonable seizure and the right to confront witnesses against him.

How Regan maintains this one letter of June 17, 1981 denies him these rights is difficult to believe or understand. He is a licensed attorney in New York and nothing

ever occurred in the Grievance Committee to change or question that. It is obvious from this case he still is practicing law and is indeed suing the Town, whom he has accused of intimidation.

Regan has not cited one case in support of his argument that he was entitled to a hearing or any other due process. There is no question of a deprivation of "property" or "liberty" as defined in *Board of Regents v. Roth,* 408 U.S. 564 (1972).

The grievance was not publicized, and in fact the request to Mr. Regan to be more courteous supports Levy's complaint.

Surely, Regan is not claiming that an attorney such as Levy does not have the right to file a complaint with the Bar Association. He filed one himself against her.

This Court has recognized in the past, the strong State interest in the integrity, competence and professional standards of members of the bar. This Court has exercised "younger" abstention in allowing State disciplinary procedures to proceed without Federal review. *Anonymous v. Association of the Bar of City of N.Y.,* 515 F.2d 427 (1975).

There is no subject matter jurisdiction in the Federal District Court to review the application of State disciplinary procedures to a particular individual. *District Court of Appeals v. Feldman,* 103 S.Ct. 1303 (1983), *Zimmerman v. Grievance Committee of the Fifth Judicial District of the State of New York,* 2d Circuit 1984, New York Law Journal, page 1, February 2, 1984.

Defendant also contends that the complaint of Levy does not constitute action under color of law executing a policy, custom, regulation or ordinance of the Town as required under *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978).

Levy's explanation for her complaint, clearly shows she did not file it to execute Town policy or in following any custom or procedure used in the Town. Kerins also advised the Bar Association on December 4, 1981, that her complaint did not have the approval or disapproval of the Town and its elected officials. He testified it was something Ms. Levy felt she should do.

There is no mention of any other grievances being filed against other attorneys, although plaintiff has attempted to show that the firing of a Town employee, Rosenbloom, and the slander suit brought by a citizen (Van Houten), are relevant to this action. There is absolutely no connection. Levy was not involved in either of those cases. Neither involved the filing of a grievance and neither were plaintiffs in litigation against the Town.

Merely because a municipality as large as the Town of Brookhaven is involved in numerous cases in litigation is not unusual, and absent any common factors with the present case, there is nothing to show Town custom or policy. More than a state tort must be shown. *Paul v. Davis,* 424 U.S. 693 (1976). Here, Levy's actions do not establish a state tort.

The Court has both the right and the duty to *sua sponte* dismiss frivolous actions. *Sommer v. Rankin,* 449 F. Supp. 66 (1978).

Plaintiff must allege *facts* which can establish a viable §1983 claim. Here Regan alleges that Levy filed a complaint against him with the Bar Association. There is nothing illegal about filing such a complaint and plaintiff's allegation that this denied him free speech is self-serving, conclusory and frivolous in the face of Levy's explanation and the contents of the letter itself.

Plaintiff must also allege facts showing that official Town policy or custom was the moving force behind the deprivation, and even if the Court considered this a denial of free speech, it is clear Levy's letter was written about an isolated situation between her and a litigant rather than an expression of Town policy. She wrote the letter six days after Regan's affidavit.

Plaintiff has engaged in meritless litigation for 18 months over something that should have ended with the Grievance Committee.

POINT II.

The Court of Appeals decision does not conflict with any holding of this Court.

Petitioner has completely misconstrued the holdings of this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

Petitioner would have to allege a "publication" of the stigmatizing material and it would have to be false, and published while petitioner was being fired or dismissed from employment to come within the grasp of the *Roth* case, *supra*. Regan was not employed by the Town of

Brookhaven and the letter to the Grievance Committee was not published outside the Committee.

Under *Monell, supra,* plaintiff would have to plead facts showing that Levy's complaint to the Grievance Committee executed Town policy, custom or procedure. Respondent maintains that the actions of the Assistant Town Attorney did not execute or implement Town policy or custom.

More importantly, however, even if plaintiff could get past the requirements established in *Monell, supra,* to establish a civil rights violation against a municipality, he must plead facts showing he has been deprived of a constitutional right.

This is where petitioner's case must fail as both Judge Misher and the Court of Appeals have unanimously agreed that the actions Regan complains of do not constitute a deprivation of constitutional rights as protected by 42 U.S.C. §1983.

If anyone has a valid claim for infringement of speech, it is Sherri Ann Levy, not Edward Regan. The Town has been sued solely for her exercise of her obligations and rights as an attorney to complain to the local Bar Association about the conduct of another attorney during litigation.

Finally, Regan's claim that his case is one of public importance is ludicrous. He has imagined the claimed civil rights violations and fraud alluded to in his petition. He has been rebuffed at every stage of this litigation and informed that his case is frivolous. To continue this case by seeking certiorari is an incredible waste of the time and

money of the respondent, the Courts and taxpayers and respondents will seek attorneys' fees based upon Regan's continued prosecution of something that is frivolous and should have been dropped in 1982.

Conclusion.

The petition for a writ of certiorari should be denied with costs and attorneys' fees to be paid to the respondent.

Respectfully submitted,

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83-1794

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD J. REGAN,

Petitioner,

vs.

THE TOWN OF BROOKHAVEN,

Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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THE TOWN OF BROOKHAVEN,

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Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

ISSUES PRESENTED

I. The Gravaman of Petitioner's complaint is deprivation of constitutional rights over which the Federal Courts have jurisdiction.

II. The Decision below conflicts with decisions of this Court on important issues affecting Federal Constitutional rights.

III. Petitioner's case was dismissed before discovery was completed and he was therefore unable to state all the facts in support of his assertion that his constitutional rights were impaired.

IV. The Issues presented are of public importance.

STATEMENT OF FACTS

The Town of Brookhaven's complaint to the Suffolk County Bar Association Grievance Committee was written after the public referendum which defeated the playground project which would have cost the community over $150,000 in tax money, and resulted in the cancellation of the Federal grant, and after an open work session of the Town Board at which the outcome of the referendum and the future of the Federal grant were discussed.

Town Attorney Kerin's letter of December 4, 1981, which was merely an attempt to disassociate the Town from the complaint and to mitigate damages was not written until after a notice of claim had been filed against the Town and after the Suffolk County Grievance Committee had reached a decision. The letter does not contradict his prior admissions to the Town Supervisor and councilmen that he approved the complaint or his testimony in which he did not deny knowledge that the complaint was made on Town stationery and admitted he might have seen the actual complaint. He defended Assistant Town Attorney Levy's use of the power and prestige of her office on the grounds of scope of employment. Indeed, he himself had made false accusations of adultery against a married woman with children who had crossed the Town and the Town paid $25,000 damages since the slander was perpetrated as Town business.

This action was commenced prior to the decision of the Grievance Committee because the gravaman of petitioner's complaint is not that a complaint was made, nor the action taken by the Grievance Committee, but deprivation of constitutional rights. The Town took action against the appellant in retaliation for his exercise of free speech and petition, which resulted in the defeat of a Town-sponsored project and the loss of a Federal grant.

The grievance procedure did not prevent the petitioner from commencing a lawsuit against the Town. In the letter informing him of the dismissal of his complaint against the Assistant

Town Attorney the Chairman said: "The determination of the Committee does not preclude you from pursuing any legal remedy which may be available to you."

Petitioner's license to practice law was threatened when the Grievance Committee accepted and investigated the complaint. A complaint charging an attorney with unethical conduct implies a request that he or she be disciplined.

The fact that the written complaint was addressed to the Grievance Committee is not evidence that the contents of the complaint have not been made public. Theoretically, there is confidentiality, but petitioner knows that in actuality, there is not. The file can be unsealed on a showing of cause. One of the Town's attorneys told the appellant that the complaint would be dismissed before appellant was informed of that fact by the Grievance Committee and implied he obtained information from the Grievance Committee by telephone.

The facts and circumstances of the complaint are known by people other than those who are members of the Grievance Committee. The full extent of the publication is not yet known by the petitioner. His case was dismissed before he had completed discovery. It was dismissed shortly after a subpoena had been served on Assistant Town Attorney Levy, who drafted the Town's complaint, and who is also the wife of Suffolk County Court Judge Tisch, and well-connected. Appellant could therefore not take her deposition which, among other things, may have provided evidence regarding publication.

Petitioner has been severely damaged as a result of the Town's actions against him. The Town's attorneys' decision to limit their discovery with regard to the extent of his damages is not evidence that he has not suffered injury.

Lawyers who are competing with him for clients will say: "Oh, you're going to give that case to him, I guess you've heard about all the trouble he got in in the Town of Brookhaven and with the Grievance Committee and the judge's wife."

The fact that fraudulent statements were made on the Town's application for the Federal grant can be easily verified and could have been ascertained by the Town's attorneys had they made adequate inquiry.

Public approval was a condition for obtaining the grant. The Town represented on the application that there was public approval for the planned playground. When the appellant and other people in the community vigorously protested, the Town held a public referendum, but not until after the grant had been approved. The vote of 375 against to 19 for proves that the Town's representation of public approval was false.

On the grant application the Town stated it would acquire the land on which the playground was to be built as a fee simple and explained that the civic association agreed to donate the land to the Town if the Town would build a playground on it. Petitioner sought to prevent this in the litigation he was conducting against the Town. In her affidavits, the Assistant Town Attorney stated that the Town was not going to acquire the land, the title was not going to be transferred and that it could not be done. Her statement constitutes a sworn admission that the statement on the grant application was false.

ARGUMENT

POINT I

THE GRAVAMAN OF PETITIONER'S COMPLAINT IS DEPRIVATION OF CONSTITUTIONAL RIGHTS OVER WHICH THE FEDERAL COURTS HAVE JURISDICTION

The gravaman of appellant's complaint is that his constitutional rights of free speech, right of petition, counsel of his choice, professional independence, due process and equal protection of the law, etc., were violated, not that the Town made a complaint against him to the Grievance Committee, and that the Town's actions were in retaliation for the exercise of constitutionally protected rights.

Petitioner is not asking the Court to review the application of State disciplinary procedures to him. He is not suing the Grievance Committee. All he seeks from the Grievance Committee is disclosure of its files. He is seeking redress for the violation of his Constitutional rights by The Town.

The Town's attorneys list several cases which hold that a Federal District Court cannot review the application of State disciplinary procedures to a particular individual.

In *Anonymous v. The Association of the Bar of the City of New York*, 515 F.2d 427 (1975) an attorney was denied injunctive and declaratory relief against the bar association.

In *District Court of Appeals v. Feldman*, 103 S. Ct. 1303 (1983), it was held the district court had no jurisdiction over the state court's decision denying admission to the Bar and refusing permission to sit for the bar examination, but remanded the portion of the action claiming the rule was in violation of the Fifth Amendment and the Sherman Act.

In *Zimmerman v. Grievance Committee of the Fifth Judicial District of the State of New York*, 2d Circuit, 1984 New York Law Journal page 1, February 2, 1984, an attorney challenged a state court ruling disciplining him. The U.S. Circuit found the Federal courts lack subject matter jurisdiction over a collateral civil rights challenge to a state court judgment disciplining an attorney.

In this action petitioner is not challenging a state court ruling disciplining him, seeking injunctive or declaratory relief against a bar association, or challenging the Grievance Committee's decision or its investigation. However, since the complaint made against him was that he said there were contradictory sworn statements in two affidavits within the content of litigation papers, which are absolutely privileged by the right of free speech, a civil rights challenge would not be collateral.

Since appellant is not seeking review of the Grievance Committee's actions, these cases cited by the Town's attorneys are

irrelevant in this case. Since these cases also hold that the state ruling can be reviewed in the U.S. Supreme Court, they are irrelevant to the defense against a petition for a writ of certiorari.

The case *Sommer v. Rankin*, 449 F. Supp. 66 (1978) was in effect a case for legal malpractice which was not cognizable under the Civil Rights Act of 1871 and there was total absence of state action.

Deprivation of constitutional rights is cognizable under the Civil Rights Act, and in this case there is state action.

POINT II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS.

Although the case *Board of Regents v. Roth* 408 U.S. 564 (1972) dealt with the non-retention of a university instructor, the case does not limit procedural due process to matters related to being fired or dismissed from employment.

In the cases *Wisconsin v. Constantineau* 400 U.S. 433 and *Goss v. Lopez* 419 U.S. 565 (1975), firing was not an issue but in both cases it was held that there was a violation of procedural due process.

In the case *Paul v. Davis*, 424 U.S. at 710-711, this Court reasoned: "It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status." And in Footnote 5 thereto: "There are other interests, of course, protected not by virtue of their recognition by the law of a particular State

but because they are guaranteed in one of the provisions of the Bill of Rights which has been incorporated into the Fourteenth Amendment. Section 1983 makes a deprivation of such rights actionable independently of state law."

In this case the Town stigmatized the appellant before his professional community, charging that he was unethical and sexist. This charge is now part of his permanent record. Appellant knows that the charge has been publicized beyond the members of the Grievance Committee. The charges are false. The file can be opened if cause is shown. The charge that appellant is a sexist could preclude him from governmental and other employment.

The complaint was made in retaliation for appellant's exercise of his constitutional rights. The complaint was that he pointed out discrepancies in sworn statements made by his adversary, in papers connected with litigation, which were therefore protected by free speech.

Petitioner is a licensed attorney under the law of New York State and his right to conduct litigation and point out discrepancies in his opponent's position is protected by that law.

At issue in this case are interests protected by virtue of their recognition by State law and because they are guaranteed by the Bill of Rights. Petitioner has been deprived of these rights and this deprivation is actionable independently of state law under Section 1983.

The Town's complaint was made pursuant to the policy articulated by one of its councilmen that the Town must have a means to deal with people who cast aspersions on it. The actions taken against Assemblyman Bianchi, George Proios, Maria Van Houten and Gloria Rosenblum were also pursuant to this policy. The complaint against Gloria Rosenblum would have been made to the Grievance Committee instead of the Ethics Committee had it not been for the advice of a former Supervisor who had been chairman of the Ethics Committee. Since not all people who cross the Town are lawyers, the retaliatory action taken against them cannot always include the filing of a grievance complaint.

Levy was employed by the Town Attorney's office when all of these actions were taken. The former Supervisor testified that he would suggest such complaints be made by the Town Attorney's office, and if they were, Levy would be familiar with the procedure.

During the Rosenblum case a councilperson testified that Levy complained of sexual discrimination. She was ultimately assigned cases that Gloria Rosenblum had handled.

The complaint was not an individual complaint against as isolated incident. It was part of a calculated Town policy to oppress dissenters, a policy which will continue, if not forcibly stopped.

Levy has not been subjected to cross-examination in this case and any explanations of her actions are hearsay and should be given no weight. Nothing in the language of Section 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. *Parratt v. Taylor*, 451 U.S. 527 (1981)

The Van Houten and Rosenblum cases arose as a result of action taken by the Town against people who opposed it and tried to expose fraud or corruption, as did appellants.

The statement that neither Van Houten nor Rosenblum were plaintiffs against the Town is false. Both were plaintiffs against the Town. In Van Houten, the Town assumed responsibility and paid the settlement. In Rosenblum the case was dismissed against the Town Attorney and councilmen and allowed to continue only against the Town.

The attorneys representing the Town in this action represented it in the Van Houten and Rosenblum cases and therefore know they were plaintiffs against the Town. This same false statement was made in their brief in the appeal to the Second Circuit and the falsity of it was pointed out in the reply brief. The Town's attorneys have failed to correct their misstatement of fact and it has now been ratified by a partner of the firm. It therefore appears to be a deliberate attempt to mislead the Court.

The cases mentioned above have common factors with the present case. All the individuals spoke against Town corruption and policies and all were acted against by the Town because they spoke out. This together with the statement made by the councilman that action should be taken against people who cast aspersions against the Town constitute Town custom and policy.

The making of complaints to Grievance Committees and/or other agencies is part of the custom and policy of the Town. It is a custom of seeking to have individuals punished for the exercise of their constitutional rights by an entity other than the Town itself. It is seeking to do indirectly what it cannot do directly, and in accordance with the findings in *Hannegan v. Esquire, Inc.* 327 U.S. 146, this custom is in violation of the Constitution.

With perceived immunity for its false, defamatory and libelous allegations, the Town has attempted to rid itself of opponents.

POINT III

PETITIONER'S CASE WAS DISMISSED BEFORE DISCOVERY WAS COMPLETED AND HE WAS THEREFORE UNABLE TO STATE ALL THE FACTS IN SUPPORT OF HIS ASSERTION THAT HIS CONSTITUTIONAL RIGHTS WERE IMPAIRED.

This case was dismissed several days after a subpoena was served on Levy. Petitioner was denied the opportunity to conclude important disclosure. He was denied disclosure of Grievance Committee files.

The petitioner's allegations were not presumed to be true and he was denied the right to prove them. Instead the Town's denials were presumed true and the case dismissed.

POINT IV

THE ISSUES PRESENTED ARE OF PUBLIC IMPORTANCE

The actions taken by the Town against the petitioner limit his professional independence and have a chilling effect on him and others who would speak out against fraud and corruption in the Town and conduct litigation to prevent it.

An independent Bar is indispensable to liberty. The greater the degree of independence, the more expansive are the perception and expression of liberty. An independent Bar is indispensable to an independent judiciary without which no civilized society can really subsist.

If the Town of Brookhaven is allowed to continue its course of conduct of punishing people who speak out against waste, corruption and fraud, the people of the Town, the nation and the Federal Government itself, will suffer. The Town will be able to continue applying for and receiving Federal grants even though they perpetrate fraud against the Federal Government to obtain grants, because those who would speak out and attempt to prevent the fraud will be afraid to do so because of retaliation. The tax money of the people of this nation will be wasted on unworthy projects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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